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10  
11 Attorneys for Defendants New York Life Insurance  
12 Company and New York Life Insurance and  
Annuity Corporation

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA

15 OLGA ORTMANN, as an individual  
16 and on behalf of all others similarly  
situated,

17 Plaintiff,

18 v.

19 NEW YORK LIFE INSURANCE  
20 COMPANY, a corporation; NEW  
YORK LIFE INSURANCE AND  
21 ANNUITY CORPORATION, a  
corporation; and DOES 1 through 20,  
22 inclusive,

23 Defendants.

Case No. C 07-02506 WHA

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION TO  
DISMISS THE EIGHTH, NINTH,  
TENTH, AND ELEVENTH CAUSES  
OF ACTION IN PLAINTIFF'S  
COMPLAINT**

**[FED. R. CIV. PROC. 12(b)(6)]**

Judge: Hon. William Alsup  
Date: July 5, 2007  
Time: 8:00 a.m.  
Courtroom: 9, 19th Floor

1 **I. INTRODUCTION**

2 In this putative wage and hour class action, Plaintiff Olga Ortmann  
 3 (“Plaintiff”) alleges that she was employed as an “insurance agent” for Defendants  
 4 New York Life Insurance Company and New York Life Insurance and Annuity  
 5 Corporation (“Defendants”). (Complaint, ¶ 11). In her second through seventh  
 6 causes of action, Plaintiff alleges violations of Labor Code for failure to pay  
 7 minimum wage, failure to pay overtime, failure to provide meal and rest breaks,  
 8 failure to indemnify and illegal wage deductions failure to pay compensation upon  
 9 discharge, and failure to furnish accurate itemized wage statements. In her ninth  
 10 and tenth causes of action Plaintiff attempts to recast these same claims as the  
 11 common law tort of conversion and quasi-contract claim of unjust enrichment. As  
 12 numerous courts have held, these claims are not viable. The Labor Code sections  
 13 on which these causes of action are premised provide the exclusive remedy, and  
 14 Plaintiff’s ninth and tenth causes of action should be dismissed.

15 In her eighth cause of action, Plaintiff attempts to state a claim for  
 16 accounting. Plaintiff, however, has not pled, nor can she plead, that her remedy at  
 17 law is inadequate. Accordingly she is not entitled to seek equitable relief of  
 18 accounting and the eighth cause of action should be dismissed.

19 In her eleventh cause of action, Plaintiff seeks injunctive relief to enjoin  
 20 Defendants from continuing their “wrongful and ongoing business practices.”  
 21 However, Plaintiff does not have standing to seek injunctive relief because, as  
 22 alleged in her Complaint, she is no longer affiliated with Defendants. Therefore,  
 23 Plaintiff’s eleventh cause of action should be dismissed as a matter of law.

24 **II. LEGAL ARGUMENT**

25 **A. Plaintiff’s Ninth and Tenth Causes of Action for Unjust**  
 26 **Enrichment and Conversion Are Barred By The Exclusive**  
 27 **Remedy Doctrine.**

28 In her ninth cause of action, Plaintiff asserts a quasi-contract claim for unjust

1 enrichment alleging that Defendants failed to pay overtime, failed to allow for meal  
 2 and rest breaks, and failed to reimburse Plaintiff for certain expenses and losses.  
 3 (Complaint, ¶¶ 63-68). In her tenth cause of action, Plaintiff asserts a tort claim for  
 4 conversion, also based on the allegations that Defendants failed to pay overtime,  
 5 failed to allow for meal and rest breaks, and failed to reimburse Plaintiff for certain  
 6 expenses. (Complaint, ¶¶ 69-78). These causes of action are improper and should  
 7 be dismissed because the statutory remedies under the Labor Code provide the  
 8 exclusive remedies.

9 The exclusive remedy doctrine is the rule that, “where a statute creates a right  
 10 that did not exist at common law and provides a comprehensive and detailed  
 11 remedial scheme for its enforcement, the statutory remedy is exclusive.” *Rojo v.*  
 12 *Kliger*, 52 Cal. 3d 65, 79 (1990). Sections 1194(a), 226.7(a) and 2802 of the Labor  
 13 Code, which created private rights of action for employees who are due overtime  
 14 wages and minimum wages, compensation for missed meal and rest periods, and  
 15 indemnification for certain necessary business expenses, are the sole remedies  
 16 provided by the California Legislature for such claims.

17 In *Green v. Party City Corporation*, 2002 U.S. Dist. LEXIS 7750 (C.D. Cal.  
 18 Apr. 9, 2002), the plaintiff alleged three causes of action for overtime  
 19 compensation: 1) violation of Labor Code § 1194.2) violation of the UCL, and 3)  
 20 conversion. *Id.* at \*1. The court held that “the statutory remedies for unpaid  
 21 overtime wages bar[red] [the] plaintiff’s claim for conversion” because “the duty to  
 22 pay overtime is a duty created by statute rather than one that existed at common  
 23 law” and “the Labor Code provides a detailed remedial scheme for violation of its  
 24 provisions.” *Id.* at \*13-14.

25 Similarly, in *Pulido v. Coca-Cola Enterprises, Inc.*, 2006 U.S. Dist. LEXIS  
 26 43765 (C.D. Cal. May 25, 2006), the plaintiffs brought a claim for conversion  
 27 based on the defendants’ alleged failure to provide meal and rest periods. *Id.* at  
 28 \*26. Citing *Green*, the court dismissed the plaintiffs’ conversion claim because the

1 right to meal and rest periods did not exist at common law prior to the enactment of  
 2 the Labor Code. *Id.* at \*25-28. The Court in *Gilles v. Micro Electronics, Inc.*, Case  
 3 No. CV 05-7537 SVW (C.D. Cal. April 26, 2006),<sup>1</sup> dismissed Plaintiff's claims for  
 4 fraud, negligent misrepresentation, and breach of the covenant of good faith and  
 5 fair dealing which were based on failure to pay overtime and minimum wage,  
 6 holding that the California Labor Code provisions for overtime and minimum wage  
 7 provided the exclusive remedy. *Id.* at pp. 6-10.

8 Numerous other cases have held that variously pled claims are invalid if they  
 9 are premised solely on violations of wage and hour statutes, because those statutes  
 10 provide the exclusive remedies for such claims. *Tombrello v. USX Corp.*, 763 F.  
 11 Supp. 541, 545 (N.D. Ala. 1991) (granting employer's motion for summary  
 12 judgment on claim for "wrongful refusal to pay" because it was actually an  
 13 allegation of an FLSA violation that must be brought under the FLSA, "the  
 14 exclusive remedy for enforcing these rights") (emphasis added); *Nettles v. Techplan*  
 15 *Corp.*, 704 F. Supp. 95 (D. S.C. 1988) (granting employer's motion for summary  
 16 judgment on "claims that the defendants negligently maintained their own time  
 17 records and thereby deprived plaintiff of his overtime compensation," because the  
 18 FLSA governs the ability of the employee to recover overtime and the employee  
 19 cannot circumvent the FLSA by alleging negligence); *Sorenson v. CHT Corp.*, 2004  
 20 WL 442638, at \*5-7 (N.D. Ill. Mar. 10, 2004) (dismissing unjust enrichment claim  
 21 based on the same factual assertions as FLSA allegation because the FLSA  
 22 provides an "exclusive remedy"); *Johnston v. Davis Security, Inc.*, 217 F.Supp.2d  
 23 1224, 1227-28 (D. Utah 2002) (dismissing various state common law claims,  
 24 including one for unjust enrichment, on the grounds that they were duplicative of  
 25 the FLSA claim).

26 Plaintiff's attempt to circumvent the exclusive rights and remedies provided  
 27

28 <sup>1</sup> Attached hereto as Exhibit A.

1 by the Labor Code by recasting her claims as ones for unjust enrichment and  
 2 conversion is barred by the exclusive remedy doctrine. Accordingly, Plaintiff's  
 3 ninth and tenth causes of actions must be dismissed.

4 **B. Plaintiff's Eighth Cause of Action for Accounting Is Barred**  
 5 **Because There Is An Adequate Remedy At Law.**

6 In her eighth cause of action, Plaintiff seeks the equitable relief of  
 7 accounting. The basis for Plaintiff's claim is Defendant's alleged failure to pay  
 8 minimum wages and overtime compensation, to provide meal and rest breaks, and  
 9 to reimburse or indemnify Plaintiff for certain expenses. (Complaint, ¶ 60). It is  
 10 well established, however, that in order to state a claim for accounting, Plaintiff  
 11 must allege the absence of an adequate remedy at law. *See, e.g., 3Com Corp. v.*  
 12 *Electronics Recovery Specialists, Inc.*, 104 F. Supp. 2d 932, 941 (N.D.Ill. 2000);  
 13 *Taliaferro v. Taliaferro*, 144 Cal. App. 2d 109, 113 (1956) (dismissing cause of  
 14 action for equitable relief where there was an available and adequate legal remedy).

15 Here, Plaintiff has not alleged that there is an inadequate legal remedy, nor  
 16 can she. Indeed, "[i]t will be the rare case where an equitable accounting lies, since  
 17 legal remedies are more adequate; discovery is liberal under the Federal Rules of  
 18 Civil Procedure; and the requirement of inadequacy of remedy at law remains the  
 19 same. *Executone of Columbus, Inc. v. Inter-Tel, Inc.* 2007 WL 1144866, \*4 (S.D.  
 20 Ohio 2007). Accordingly, Plaintiff cannot maintain an equitable claim for  
 21 accounting and her eighth cause of action should be dismissed.

22 **C. Plaintiff's Eleventh Cause of Action for Injunctive Relief Is Barred**  
 23 **Because Plaintiff Does Not Have Standing To Seek Injunctive**  
 24 **Relief.**

25 In her eleventh cause of action, Plaintiff alleges that Defendants violated  
 26 various provisions of the California Labor Code. (Complaint, ¶¶ 80). Plaintiff then  
 27 requests that "Defendants be enjoined from continuing with the wrongful and  
 28



1 ongoing business practices . . . and that the Court issue an appropriate injunction.”  
 2 (Complaint, ¶ 81, Prayer for Relief, ¶ 8).

3 To have standing to bring a claim, Article III of the United States  
 4 Constitution requires that a plaintiff satisfy three elements: 1) she must have  
 5 suffered an injury in fact that is a) concrete and particularized and b) actual or  
 6 imminent; 2) there must be a causal connection between the injury and the conduct  
 7 complained of; and 3) it must be likely that the injury will be redressed by a  
 8 favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).  
 9 Additionally, in seeking an injunction, the plaintiff must show a likelihood of  
 10 substantial and immediate irreparable injury and the inadequacy of remedies at law.  
 11 *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974).

12 In *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir.  
 13 2004), the plaintiff sued her insurance company for terminating her disability  
 14 benefits. *Id.* at 1004-5. The plaintiff sued under California Business and  
 15 Professions Code section 17200 and for breach of contract, among other things. *Id.*  
 16 at 1005. The district court granted the plaintiff a permanent injunction under  
 17 Section 17200. *Id.* The Ninth Circuit reversed, holding:

18 The district court erred in concluding that Hangarter had  
 19 Article III standing to pursue injunctive relief under  
 20 [Section 17200]. “Article III standing requires an injury  
 21 that is actual or imminent, not conjectural or hypothetical.  
 22 In the context of injunctive relief, the plaintiff must  
 23 demonstrate a *real or immediate threat* of an irreparable  
 24 injury.” . . . ***Hangarter currently has no contractual***  
 25 ***relationship with Defendants and therefore is not***  
 26 ***personally threatened by their conduct.***

27 *Id.* at 1021-22 (emphasis added).

28 Nor does it matter whether the plaintiff has standing to bring a claim for non-

1 equitable relief. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the plaintiff  
 2 sued the City of Los Angeles for excessive force and police brutality for use of a  
 3 chokehold. *Id.* at 97-98. The plaintiff also sought injunctive relief against the use  
 4 of chokeholds. *Id.* at 98. The district court denied the claim for injunctive relief,  
 5 and the Court of Appeals reversed, finding that there was a sufficient likelihood that  
 6 the plaintiff would be stopped again and subject to a chokehold. *Id.* at 99. The  
 7 U.S. Supreme Court disagreed:

8 [The plaintiff] fares no better if it be assumed that his  
 9 pending damages suit affords him Article III standing to  
 10 seek an injunction as a remedy for the claim arising out of  
 11 the October 1976 events. The equitable remedy is  
 12 unavailable absent a showing of irreparable injury, a  
 13 requirement that cannot be met where there is no showing  
 14 of any real or immediate threat that the plaintiff will be  
 15 wronged again—a “likelihood of substantial and  
 16 immediate irreparable injury.” *O’Shea v. Littleton*, 414  
 17 U.S. at 502, 94 S.Ct. at 679. The speculative nature of  
 18 [the plaintiff’s] claim of future injury requires a finding  
 19 that this prerequisite of equitable relief has not been  
 20 fulfilled.

21 *Id.* at 111. *See also Hodgers-Durbin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir.  
 22 1999) (holding that the plaintiffs did not have standing to seek an injunction against  
 23 racial profiling at the Mexican-American border, because they were not sufficiently  
 24 likely to be pulled over again by the Border Patrol); *Oprychal v. New York Life Ins.*  
 25 *Co.*, No. CV 07-518, pg. 4 (C.D. Cal. April 13, 2007)<sup>2</sup> (striking insurance agent’s  
 26 request for injunctive relief: “because plaintiff has no relationship with Defendant  
 27

28 <sup>2</sup> Attached hereto as Exhibit B.

1 that would give rise to an actual and imminent threat of harm, injunctive relief is  
 2 insupportable as a matter of law").<sup>3</sup>

3 Here, like the plaintiff in *Hangarter* and *Opyrchal*, Plaintiff has no standing  
 4 to seek injunctive relief, because she no longer has any type of relationship with  
 5 Defendants and is therefore not personally impacted by Defendants' alleged  
 6 conduct. (Complaint, ¶ 11). She also has no basis to show irreparable harm when  
 7 all of her alleged claims can be redressed by monetary recovery. Thus, Plaintiff's  
 8 eleventh cause of action should be dismissed.

### 9 **III. CONCLUSION**

10 For the foregoing reasons, Defendants request that the Court grant their  
 11 motion to dismiss the eighth, ninth, tenth, and eleventh causes of action in  
 12 Plaintiff's Complaint.

13 Dated: May 24, 2007

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17 By /s/ JILL A. PORCARO

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 New York Life Insurance Company  
 and New York Life Insurance and  
 Annuity Corporation

26  
 27 <sup>3</sup> Defendants are concurrently moving to stay, transfer or, in the alternative, dismiss certain causes  
 28 of action in the present action given the pendency of the *Opyrchal* case, under the "first to file"  
 rule.